Harley-Davidson Motor Company *and* International Association of Machinists and Aerospace Workers, Tyson Lodge 175, District 98. Case 05–CA–183791

June 29, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, KAPLAN, AND EMANUEL

On June 27, 2017, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief, which the Charging Party joined.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally offering a voluntary separation incentive plan ("VSIP") to employees in August 2016 without affording the International Association of Machinists and Aerospace Workers, Tyson Lodge No. 175, District 98 (the Union) notice and an opportunity to bargain.[2] The judge noted that the VSIP was offered in conjunction with a planned October layoff, which the Respondent had a right to unilaterally implement under the parties' collective-bargaining agreement. The judge reasoned that because the Union had waived its right to bargain about the layoff, it had also waived its right to bargain about the VSIP. The judge also noted, however, that if the Respondent had any obligation to bargain over any aspect of the layoff, its presentation of the VSIP "would certainly qualify as a *fait accompli*." For the reasons explained below, we find that the judge erred in finding that the Respondent had no obligation to bargain about the VSIP. We also find that the Union did not waive its right to bargain about the VSIP because the Respondent presented it as a fait accompli.

I.

Background

The facts are largely undisputed. The Respondent manufactures and assembles motorcycles at its York, Pennsylvania plant. Michael Fisher is the general manager of the York facility. The Union has represented a unit of the Respondent's production and maintenance employees for several decades. Brian Zarilla is president of the Union, and Kermit Forbes and David Staub are the vice-president and chief steward, respectively. The parties' most recent collective-bargaining agreement is effective from February 1, 2016, through October 15, 2022. Article 8 of the agreement provides for indefinite layoffs by plant-wide seniority, with certain notice requirements.[3]

On August 26, managers at the Respondent's headquarters in Milwaukee, Wisconsin finalized plans to reduce its York facility workforce by 102 bargaining-unit employees through a combination of layoffs and a VSIP offered to senior tier I employees who chose to voluntarily resign.[4] That same day, Kyle Johansen, director of business services and Labor Relations, emailed a draft of the VSIP to Fisher, instructing him that it was to be presented to the Union as a memorandum of understanding and to keep it confidential until "corporate" gave the go-ahead. On August 29, after receiving the green light, Fisher informed Forbes and Staub that, in conjunction with layoffs, the Respondent would be offering a one-time $15,000 VSIP to employees. Fisher also advised them that the Respondent would conduct "town hall" meetings with employees on August 31 to explain the layoffs and VSIP. Forbes telephoned Zarilla, who was on leave, and relayed the information. On August 30, Zarilla met with Fisher and complained that the Respondent had not given the Union an opportunity to bargain and that the Union objected to the amount of the incentive and the Respondent's decision to offer the VSIP only to certain employees. On August 31, Fisher nevertheless proceeded to hold six town hall meetings at which he gave a Power Point presentation informing employees of the layoffs and VSIP. Specifically, Fisher advised employees that a lump sum incentive payment

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates refer to 2016 unless otherwise stated.

[3] Art. 8 also provides for temporary layoffs, not at issue here, with different notice and seniority requirements.

[4] Tier 1 employees are more senior employees than tier 2 employees and receive a higher wage rate than tier 2 employees.

would be available to certain Tier 1 employees who applied between September 6 and 16.

On September 1, the Respondent emailed a copy of the VSIP to Zarilla. In an email on September 2, Zarilla advised Johansen that the Union was not in agreement with the VSIP and demanded bargaining over it. Johansen responded that he was happy to discuss the VSIP and would telephone Zarilla at 2 p.m. Zarilla asked, "Is this something you want to negotiate?" Johansen replied, "I'm willing to have a discussion with you in response to your letter." On September 6, following a telephone conversation between the two, Johansen emailed Zarilla, in pertinent part:

> …I understand the [U]nion would prefer a different approach than the $15[,000] voluntary separation incentive the Company is currently offering. Unfortunately, the current $15[,000] is all the Company is prepared to offer.

From September 6 through 23, Johansen and Zarilla exchanged correspondence about the VSIP. Even so, the Respondent did not withdraw the VSIP, and ultimately seven employees signed up for it during the open period.

The Judge's Findings

Citing the Union's failure to respond to Johansen's September 6 email—which stated, "[I]f the [U]nion does not want the Company to proceed, we will withdraw the voluntary incentive offer, cancel the current process underway and implement the layoffs as required under the CBA"—the judge found that the Union gave the Respondent "carte blanche with regard to this layoff." The judge also found that the VSIP effectively was part of the layoff because the Respondent implemented them in conjunction with each other. As noted above, however, the judge also concluded that, "If [the] Respondent had an obligation to bargain over any aspects of this layoff, its presentation of the $15,000 incentive would certainly qualify as a *fait accompli*. It was presented to the Union shortly before implementation and was presented as a 'take it or leave it' proposition."

The General Counsel argues that the judge erred in finding that the VSIP was an aspect of the layoff. The General Counsel acknowledges that the parties' collective-bargaining agreement gives the Respondent the right to conduct both temporary and indefinite layoffs, determine the size of layoffs, and conduct layoffs by reverse seniority. The General Counsel argues, however, that the collective-bargaining agreement does not speak to VSIPs and that even though VSIPs might impact the ultimate number of employees designated for layoff, the two are distinct. The General Counsel also argues that VSIPs are a mandatory subject of bargaining, but that the Respondent's implementation of the VSIP within days of telling the Union makes it a fait accompli. As discussed below, we agree with the General Counsel.

II.

DISCUSSION

The law is well settled that wages and terms and conditions of employment are mandatory subjects of bargaining over which an employer has an obligation to bargain with its employees' exclusive representative. See *NLRB v. Katz*, 369 U.S. 736, 742–743 (1962); *Lenawee Stamping Corporation d/b/a Kirchhoff Van-Robb*, 365 NLRB No. 97, slip op. at 8 (2017); *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003), enfd. 112 Fed. Appx. 65 (D.C. Cir. 2004). The obligation to bargain may be waived by the Union either by the terms of a collective-bargaining agreement or by conduct, but the waiver must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Philadelphia Coca-Cola Bottling Co*., supra at 353. When an employer presents the bargaining representative with a fait accompli, however, the Board will not find a waiver. *Comau, Inc.*, 364 NLRB No. 48, slip op. at 3 (2016); *Tesoro Refining & Marketing Co.*, 360 NLRB 293, 295 fn. 10 (2014) ("[T]he Union cannot be held to have waived bargaining by failing to pursue negotiations over changes that were presented as a fait accompli.").

As detailed above, on August 29, the Respondent informed the Union that it planned to implement a layoff and offer certain employees a VSIP of $15,000. No party contests that Article 8 of the 2016–2022 collective-bargaining agreement reserves to the Respondent the right to implement indefinite layoffs based on seniority. But neither Article 8 nor anything else in the collective-bargaining agreement addresses VSIPs, which are payments to current employees as inducements to get them to retire and, therefore, encompass wages and terms and conditions of employment. Thus, VSIPs are mandatory subjects of bargaining. See *North American Pipe Corp.*, 347 NLRB 836, 837 (2006) (wages include "emoluments of value which may accrue to employees out of their employment relationship.") (citation omitted), petition for review denied sub nom. *UNITE HERE v. NLRB*, 546 F.3d 239 (2d Cir. 2008).[5] The fact that the Respondent offered the VSIP in conjunction with its announcement of layoffs does not make the VSIP part and parcel of the

[5] But cf., *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (insurance benefits of retirees are not a mandatory subject of bargaining).

impending layoffs. The VSIP fundamentally differs from layoffs in that eligibility for the VSIP was limited to Tier 1 employees, whom the Respondent would not have been able to target for layoff under the collective-bargaining agreement because of their higher seniority. Accordingly, we find that the Respondent was obliged to bargain over the VSIP.

We also find that the Union did not waive its right to bargain over the VSIP. On August 29, the Respondent informed the Union about the VSIP, layoffs, and its decision to hold town hall meetings with employees. On August 31, despite the Union's August 30 protest, the Respondent conducted the town hall meetings and announced the VSIP and the layoffs, thereby effectively implementing the VSIP just 2 days after notifying the Union. The Respondent's notice to the Union 2 days before presenting the VSIP to employees was merely informational concerning the fait accompli and fails to satisfy the requirements of the Act. *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001) (citations omitted). Even assuming, as the Respondent asserts, that it had made the Union aware of possible layoffs early in 2016, and that Zarilla had pitched favorable retirement incentives for senior employees who were a few years shy of retirement, the record shows, and the Respondent acknowledges, that it alone devised the amount of and terms of the VSIP. As announced, the Respondent started the VSIP acceptance period on September 6, notwithstanding the Union's earlier repeated objections. To the extent that the Respondent conveyed a willingness to discuss the VSIP on September 2, on September 6, it made clear that the terms of the VSIP were not negotiable when Johansen emailed Zarilla that "if the [U]nion does not want the Company to proceed, we will withdraw the [VSIP] offer, cancel the current process underway and implement the layoffs as required under the CBA."[6] Even if we concluded that the Respondent did not present the VSIP as a fait accompli until September 6, we would find the notice period here insufficient.[7] The Board has found that an employer's decision to institute unilateral changes constitutes a fait accompli where the employer gave comparable or significantly more notice to the union than the Respondent gave here. See *Comau, Inc.*, supra, slip op. at 6, 24 (2016) (notice on January 17 and implementation on January 23); *Pontiac Osteopathic Hospital*, supra, at 1022-1023 (notice received on December 13 and implementation on January 2); *S&I Transport, Inc.*, 311 NLRB 1388, 1389 (1993) (notice on September 27 and implementation on October 1).[8]

Finally, we reject the Respondent's argument that it had no obligation to offer the VSIP and therefore no obligation to bargain over it. The fact that the VSIP was not dictated by terms of the collective-bargaining agreement and that the Respondent offered it in conjunction with the layoff, over which it was not obligated to bargain, does not alter the fact that the VSIP was a term and condition of employment and was therefore a matter the Respondent had a legal obligation to bargain over. The Board's assessment of whether an obligation to bargain exists does not turn on whether a change is an ostensible benefit or detriment to employees. See *Philadelphia Coca-Cola Bottling Co*., supra at 349 (bonus incentives), and *Pontiac Osteopathic Hospital*, supra, at 1022 (beneficial and detrimental changes to paid time off policy).

On the basis of the foregoing, we find that the Union did not waive its right to bargain about the VSIP because the Respondent presented it with a fait accompli. We therefore find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the VSIP without giving the Union notice and an opportunity to bargain about it.

ORDER

The National Labor Relations Board orders that the Respondent, Harley-Davidson Motor Company, York, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees without first notifying International Association of Machinists and Aerospace Workers, Tyson Lodge No. 175, District 98 (the Union) and giving it an opportunity to bargain.

[6] This email also underscores the fact that the Respondent was well aware that, while it had the contractual prerogative to implement the layoffs without the Union's approval, it had no such right with respect to the VSIP. Johansen's correspondence with Zarilla after September 6 does not render the Respondent's conduct any less a fait accompli or the Union's conduct more of a waiver, much less cure or repudiate the Respondent's conduct under the Board's *Passavant* standards. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978) (repudiation of unlawful conduct must be timely, unambiguous, and specific in nature to the coercive conduct); see also *Allied Aviation Fueling of Dallas, LP*, 347 NLRB 248, 256 (2007) (no repudiation or rescission of unilateral change in drug-testing policy).

[7] There is no suggestion that the Respondent's conduct was justified by exigent circumstances. Cf. *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995).

[8] We do not suggest that presenting a union with a proposal that puts it between the proverbial rock and a hard place is unlawful. Unions often must make difficult decisions about advantages and disadvantages that affect the employees they represent. The key here is that the proposal should be presented to the union in a timely manner.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request of the Union, rescind the September 2016 voluntary separation incentive plan.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All hourly paid plant production and maintenance employees employed at the York, Pennsylvania facility; but excluding salaried employees including, but not limited to: executive employees, supervisory employees, guards, watchmen, timekeepers, quality control employees, Engineering Department employees, clerical employees, Industrial Engineering employees, Human Resources employees, and all outside workmen hired by the Company.

(c) Within 14 days after service by the Region, post at its facility in York, Pennsylvania, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since August 31, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 5 a sworn certification of a responsible official on a form provided the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 29, 2018

_____
Mark Gaston Pearce, Member

_____
Marvin E. Kaplan, Member

_____
William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT change your terms and conditions of employment without first notifying International Association of Machinists and Aerospace Workers, Tyson Lodge No. 175, District 98 (the Union) and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, upon request of the Union, rescind the September 2016 Voluntary Separation Incentive Plan.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

All hourly paid plant production and maintenance employees employed at the York, Pennsylvania facility; but excluding salaried employees including, but not limited to: executive employees, supervisory employees, guards, watchmen, timekeepers, quality control employees, Engineering Department employees, clerical employees, Industrial Engineering employees, Human Resources employees, and all outside workmen hired by the Company.

HARLEY-DAVIDSON MOTOR COMPANY

The Board's decision can be found at www.nlrb.gov/case/05-CA-183791 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Andrea Vaughn and *Patrick J. Cullen, Esqs.,* for the General Counsel.

Brian F. Jackson, Esq. (McNees, Wallace & Nurick, LLC), of Harrisburg, Pennsylvania, for the Respondent.

Nancy B.G. Lassen, Esq. (Willig, Williams & Davidson), of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Baltimore, Maryland, on May 3, 2017. The IAM Lodge 175 filed the charge on September 7, 2016. The General Counsel issued the complaint on December 21, 2016.

On August 29, 2016, Respondent informed the Charging Party Union that it was going to lay-off 102 bargaining unit employees in the fall of 2016. It also informed the Union on August 29, at least orally, that it was going to offer a $15,000 incentive to certain unit employees if they would retire voluntarily. The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act in failing to afford the Union an opportunity to bargain with respect to the incentive plan. The General Counsel is not alleging that Respondent violated the Act in failing to provide an opportunity to bargain over the lay-off. Also, contrary to the suggestion in footnote 4 of the General Counsel's brief, he did not allege a violation for a failure to engage in bargaining over the effects of the lay-off.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, manufactures motorcycles at several facilities in the United States, including York, Pennsylvania. Respondent sold and shipped goods valued in excess of $50,000 directly to points outside of Pennsylvania from the York plant in the year ending on November 30, 2016. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union. IAM Lodge 175, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Charging Party Union has represented production and maintenance employees at Respondent's York, Pennsylvania facility for many years. As of May 2017, the bargaining unit consisted of about 1000 employees. Most of these are regular full-time employees, others are long-term casual employees, but some are short-terms casual employees.

Respondent has a 2 tier compensation system. Employees hired prior to February 2010 are generally compensated better than those hired afterwards. The parties had a collective-bargaining agreement that ran from 2010–2017. In 2015 Respondent initiated early contract negotiations which resulted in a new agreement with a term from February 1, 2016, to October 15, 2022. The new contract generally increased the compensation of unit employees. However, during the contact negotiations in late 2015, Respondent informed the Union that production of its "soft tail" model motorcycle would be moved from York to its Kansas City plant in 2017 and this would result in the loss of about 30 percent of the unit jobs at York.

On August 29, 2016, Michael Fisher, the General Manager at the York plant, went to the office of the local union, which is located next to his office. Local Union President Brian Zarilla was not at work that day. Fisher spoke to Kermit Forbes, the union's vice president, and David Staub, the union's chief steward. Fisher told Forbes about an incentive plan the company would be offering to employees who chose to resign voluntarily. This plan was being offered in conjunction with Respondent's plan to lay-off 102 employees from the York plant in the fall of 2016. There is a dispute as to whether the Union was advised of the lay-off prior to August 29.[1] I need not resolve that dispute since the issue in this case only concerns the incentive plan; not the lay-off.

Moreover, the Union did not request bargaining over the fall 2016 lay-off. Furthermore, the record establishes that Respondent could have instituted the lay-off without offering any incentives, and without bargaining over the size or timing of a

[1] The record establishes that Respondent at least hinted to the Union that there might be lay-offs in 2016 prior to August 29. Fisher, for example, told the Union that Harley's motorcycle sales were not what the company had projected they would be.

layoff (GC Exh. 6) (set forth below), (Tr. 74–76).[2]

Fisher told Forbes and Staub that Respondent would be offering those employees who would be laid off a one-time $15,000 incentive to resign (Tr. 71, 221). He also told them that the company would hold "town hall" meetings for all employees on August 31 to discuss the lay-offs and the incentive plan. Further, Fisher announced that Respondent would be slowing down the assembly line so that one motorcycle would be assembled in 90 seconds, rather than in 75 seconds. Forbes immediately called Union President Zarilla and recounted his conversation with Fisher.

The details of the incentive plan are set forth in a proposed Memorandum of Understanding (MOU) (GC Exh. 4). Mike Fisher testified that he gave a copy of this MOU to Forbes on August 29. Union officials deny this and state that they did not see the MOU until Thursday, September 1. The MOU provides that the incentive payment of $15,000 will be available to regular tier 1 employees impacted by the lay-off. It also provides that employees volunteering for termination must do so by noon on September 16 to receive the incentive payment.

Union President Zarilla met with Fisher at the York plant on Tuesday, August 30. His testimony indicates that regardless of whether the Union had a copy of the MOU, it was familiar with the details of the incentive plan.

> The conversation was pretty, pretty heated because, first of all, we didn't agree with the incentive package that they were throwing out there because we didn't get a chance to negotiate any kind of package. We didn't agree that it should only be offered to certain employees in the factory. We didn't agree that 102 people should be laid off. We didn't agree that the line rate changes should go down by 75 units a day. So we let him know that we didn't agree with it, and we weren't happy with it, and we didn't get a chance to bargain it.

Tr. 31.

Fisher also told Zarilla that Respondent would hold "town hall" meetings with employees on Wednesday, August 31 to discuss the lay-off and the incentive plan.

Fisher conducted 6 separate meetings on the 31. In these meetings he read from a power point presentation (GC Exh. 2). The power point contains specific information on the number of lay-offs and the change in the speed of the assembly line. However, with regard to the incentive plan, it only indicates that there will be a lump sum payout-without indicating the amount of the payout.

On Thursday, September 1, 2016, Theresa Kwayi, the human resources director at York, emailed the Union documents setting forth the specifics of the incentive plan. This included the amount of the one-time payment ($15,000), the date by which eligible employees must make an irrevocable decision to terminate in order to receive the incentive (between September 6 and September 16 at noon) and that employees who accepted the incentive would be give 2-weeks notice between October 10 and November 30, 2016, regarding their last day of employment.[3]

It is unclear whether the Union was appraised of when the "open season" for employees to accept the incentive would occur, prior to September 1. Also, General Manager Mike Fisher did not know the timing of the fall 2016 lay-offs until that date.

On Friday, September 2, Zarilla sent a letter to Kyle Johansen, Respondent's director of business services and labor relations, demanding bargaining over the incentive program. Johansen works at corporate headquarters in Milwaukee. Zarilla also sent the letter to Johansen as an attachment to an email. Johansen responded via email the same day stating that he was willing to discuss the bargaining demand.

Johansen and Zarilla had a telephone conversation on the morning of Tuesday, September 6 (the day after Labor Day). Johansen followed up that conversation with an email stating that $15,000 was all the company was willing to offer as an incentive for voluntary resignation. He continued:

> As we discussed the Company prefers to continue the process of seeking volunteers for the incentive and allowing employees to choose whether or not to sign up for it. At the same time, the Company does not want a confrontation with the union over the incentive. To that end, we are seeking permission from the union to proceed with the current voluntary incentive we have offered. **However, if the union does not want the Company to proceed, we will withdraw the voluntary incentive offer, cancel the current process underway and implement the layoffs as required under the CBA.** (Emphasis added)
>
> Please let me know the union's position by the close of business today. If I don't hear from you, I will assume the union has granted permission for the Company to continue the voluntary separation incentive process currently underway.

(GC Exh. 6.)

I conclude that the Union's silence constitutes an acknowledgement that Respondent was entitled to implement the lay-off however it wished—without providing an opportunity to bargain over the details of the lay-off, including whether or not to offer any incentive.

On September 7, the Union filed the charge giving rise to this case.

On September 15, the parties exchanged emails. Zarilla stated that the Union did not accept an incentive plan that did not cover all members of the local. Further, he wrote, "if that means that you are going to pull the incentive plan then you do what you need to do."

Seven eligible employees accepted the incentive to terminate their employment. Afterwards, on September 21, 2016, the Union suggested changes to the incentive plan such as offering $30,000 to 61 employees instead of $15,000 to 102, or reducing the age at which employees would be eligible for a full pen-

[2] It is unfortunate that the record does not contain the contractual clauses pertaining to management's rights with respect to lay-offs (e.g., art. 8 of the current collective-bargaining agreement). However, the record establishes that the Union had waived its rights to bargain over the fall 2016 lay-off, Tr. 75–76; GC Exh. 6.

[3] Zarilla testified that he had seen documents explaining the plan before September 1, but did not say when he saw it, Tr. 39–40.

sion.[4] Respondent rejected these suggestions.

The Union and company discussed the incentive plan over the telephone on September 21. Zarilla asked Kyle Johansen to come to York to negotiate with regard to the incentive plan, face to face. Johansen declined. Zarilla asked if the incentive plan was open for negotiation. Johansen responded that the plan was closed.[5]

On September 23, a week after the opportunity to accept the $15,000 incentive expired, the Union requested that Respondent discontinue the offer and rescind it (GC Exh. 9). Respondent rejected this request.

ANALYSIS

I am dismissing the complaint in this matter because the Union waived all its bargaining rights with respect to the fall 2016 lay-off. The record, particularly Union President Zarilla's testimony at (Tr. 74–76), and (GC Exh. 6), establish that the Union had given Respondent a carte blanche with regard to this lay-off. The Union and General Counsel do not take issue with the statement in Kyle Johnson's September 6, 2016 email that Respondent had the right to cancel the incentive program and proceed with the lay-offs without it. Instead of responding to Johnson's inquiry, the Union remained silent (other than filing a ULP charge) until September 15 when it appears to have suggested that Respondent should cancel the incentive plan and proceed with the lay-offs without any incentive plan.[6] Of course, by this time, Respondent and some employees had relied on the Union's silence to move forward with the incentive plan.

It is true, as the General Counsel states, that there generally cannot be a waiver of a union's bargaining rights when it is presented with a fait accompli*, Pontiac Osteopathic Hospital,* 336 NLRB 1021 (2001). If Respondent had an obligation to bargain over any aspects of this lay-off, its presentation of the $15,000 incentive would certainly qualify as a fait accompli. It was presented to the Union shortly before implementation and was presented as a "take it or leave it" proposition. However, the Union in the instant case had already waived its bargaining rights regarding all terms of the 2016 lay-off prior to August 29, 2016, when it learned of the $15,000 incentive offer. Moreover, its failure to respond to Johansen's September 6 email until September 15 also waived any rights it would have had to bargain over the incentive plan.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 27, 2017

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[4] Respondent had hired a lot of employees in 1988 and 1989 who were only a few years short of the service necessary to receive a full pension.

[5] The record is a little unclear as to what happened on September 21 and 22. Johansen testified that he told Zarilla on September 21 that while Respondent would not revise its pension plan as an incentive, it would take another look at doubling the size of the lump-sum payout. He testified that on September 22, he told Zarilla that Respondent would not double the payout either.

[6] I regard this as another acknowledgement by the Union that Respondent had the right to implement the lay-off without bargaining and without offering any incentive plan.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.